MOTION FILED
FEB 25 1983

No. 82-869

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

PHILIP ALAN FROUDE, *et al.*,
Petitioners,

v.

EAGLE-PICHER INDUSTRIES, INC., *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* AETNA CASUALTY AND SURETY COMPANY

HERBERT J. MILLER, JR.
JAMES E. ROCAP, III
(Counsel of Record)
STEPHEN L. NIGHTINGALE
Miller, Cassidy, Larroca & Lewin
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400
Attorneys for *Amicus Curiae*
Aetna Casualty and Surety Company

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-869

PHILIP ALAN FROUDE, *et al.*,
Petitioners,

v.

EAGLE-PICHER INDUSTRIES, INC., *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Aetna Casualty and Surety Company respectfully requests leave to file the attached Brief *Amicus Curiae* respecting the Petition for a Writ of Certiorari on the following grounds:

(1) Aetna Casualty and Surety Company ("Aetna") is an insurance company that has insured a number of manufacturers of products containing asbestos. These manufacturers have been sued by many thousands of claimants who claim, in general, that they have contracted one or more diseases as a result of their exposure to asbestos from these products.

(2) Aetna has been sued by some of its insureds for declaratory relief and damages with respect to the appli-

cation of their insurance contracts to these claims. Among the cases in which Aetna has been sued are:

ACandS, Inc. v. *Aetna Casualty and Surety Co., et al.*, No. 80-1341 (E.D. Pa.)

American Universal Ins. Co. v. *Amatex, et al.*, No. C-328207 (Cal. Super. Ct., L.A. Cty.)

Armstrong World Industries, Inc. v. *Aetna Casualty and Surety Co.*, No. C-315 367 (Cal. Super. Ct., L.A. Cty.)

Celotex Corp. v. *Aetna Casualty and Surety Co.*, No. 79-5885 (13th Cir. Ct. of Hillsborough, Fla.)

Crown, Cork & Seal Co. v. *Aetna Casualty and Surety Co.*, No. 1292 (Pa. Ct. Comm. Pl., Philadelphia Cty.)

GAF Corp. v. *Home Ins. Co.*, No. C-400014 (Cal. Super. Ct., L.A. Cty.)

GAF Corp. v. *Insurance Co. of North America, et al.*, No. 286217 (Cal. Super. Ct., L.A. Cty.)

Johns-Manville Corp. v. *Home Ins. Co., et al.*, No. C-765226 (Cal. Super. Ct., L.A. Cty.)

Keene Corp. v. *Insurance Co. of North America, et al.*, No. 78-1011 (D.D.C.)

Keene Corp. v. *Insurance Co. of North America*, No. 3152-82 (D.C. Super. Ct.)

Owens-Illinois, Inc. v. *Aetna Casualty and Surety Co.*, No. 82-0089 (D.D.C.)

Green & Flabetta v. *Travelers Ins. Co., et al.*, No. 237842 (Cal. Super. Ct., Contra Costa Cty.)

Porter v. *American Optical Corp.*, 641 F.2d 1128 (5th Cir.), *cert. denied*, 454 U.S. 1109 (1981)

(3) All of these cases raise a question of what event during the policy period—*i.e.*, exposure to asbestos, manifestation of disease, or some other alternative—

"triggers" coverage under Aetna's policies and thereby requires Aetna to defend and indemnify its insured with respect to a claim. Aetna has been a party to varying decisions in two of these suits, the *Keene* and *Porter* cases.

(4) Because of Aetna's extensive past and current involvement in insurance coverage disputes arising from asbestos claims, Aetna believes that it has an important perspective to provide this Court regarding the course of and confusion in such litigation. That perspective will more fully inform the Court of the pressing need for granting certiorari to review this case in order to provide sorely-needed certainty. A decision by this Court on the merits will significantly affect the course of litigation in which Aetna is currently involved.

(5) The consent of the parties for filing this brief has been requested, but not all parties consented.

Respectfully submitted,

HERBERT J. MILLER, JR.
JAMES E. ROCAP, III
(Counsel of Record)
STEPHEN L. NIGHTINGALE
Miller, Cassidy, Larroca & Lewin
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400
Attorneys for *Amicus Curiae*
Aetna Casualty and Surety Company

TABLE OF CONTENTS

	Page
INTEREST OF THE *AMICUS*	1
ARGUMENT	2
Introduction And Summary	2
1. The Nature Of The Conflicts Among The Federal Decisions	3
2. The Practical Importance Of This Court's Review	7
CONCLUSION	10

TABLE OF AUTHORITIES

CASES:	Page
Abbott Laboratories v. *Aetna Casualty and Surety Co.*, No. 82-0940 (D.D.C.)	8
Brinco Mining Ltd. v. *Federal Insurance Co.*, No. 82-1165 (D.D.C.)	8
Eagle-Picher Industries, Inc. v. *American Employers Ins. Co.*, No. 82-1841 (D.D.C.)	9
Eagle-Picher Industries, Inc. v. *Liberty Mutual Ins. Co.*, 682 F.2d 12 (1st Cir. 1982)	4, 5, 6
Eli Lilly & Co. v. *The Home Insurance Co.*, No. 82-0669 (D.D.C.)	7
E.R. Squibb & Sons v. *American Motorists Ins. Co.*, No. 82-0740 (D.D.C.)	8
Hercules, Inc. v. *Aetna Casualty and Surety Co.*, No. 82-0854 (D.D.C.)	7
Insurance Company of North America v. *Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *modified on rehearing*, 657 F.2d 814 (6th Cir.), *cert. denied*, 454 U.S. 1109 (1981)	4
Johnson & Johnson v. *Aetna Casualty and Surety Co.*, No. 82-1219 (D.D.C.)	8
Keene Corp. v. *Hartford Accident & Indemnity Co.*, No. 13471-82 (Superior Court of D.C.)	8
Keene Corp. v. *Insurance Company of North America*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982)	4, 5, 6
Keene Corp. v. *Insurance Company of North America*, No. 3152-82 (Superior Court of D.C.)	8
National Gypsum Co. v. *American Motorists Ins. Co.*, No. 82-1332 (D.D.C.)	8
Owens-Illinois, Inc. v. *Aetna Casualty and Surety Co.*, No. 82-0089 (D.D.C.)	7
Porter v. *American Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981), *cert. denied*, 454 U.S. 1109 (1981)	4, 5
Sandoz, Inc. v. *Employer's Liability Assurance Corp.*, No. 81-497 (D.N.J. Jan. 6, 1983)	5

Table of Authorities Continued

	Page
Schering Corp. v. *Home Insurance Co.*, 544 F. Supp. 613 (E.D.N.Y. 1982)	5
Upjohn Co. v. *General Accident Insurance Co.*, No. 82-1019 (D.D.C.)	8
STATUTES:	
28 U.S.C. § 1404	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-869

PHILIP ALAN FROUDE, *et al.*,

Petitioners,

v.

EAGLE-PICHER INDUSTRIES, INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

---

BRIEF OF *AMICUS CURIAE* AETNA CASUALTY AND SURETY COMPANY

Aetna Casualty and Surety Company, as *amicus curiae*, respectfully urges the Court to grant the petition for a writ of certiorari in this case.

INTEREST OF THE *AMICUS*

Aetna Casualty and Surety Company ("Aetna") is one of the country's largest liability insurance companies. Over the last forty years, it has entered into insurance contracts with a number of companies that manufactured products containing asbestos. These companies have, in recent years, been sued by thousands of individuals who allege that they have contracted one of several asbestos-related diseases as a result of exposure to those products. Because of the substantial amount of time that typically

passes between a person's exposure to asbestos and the onset of disease allegedly caused by that exposure, disputes have arisen between Aetna and some of its insureds as to the application of Aetna's policies to the resultant product liability claims. A list of lawsuits resulting from these disputes is set forth in Aetna's motion for leave to file this Brief *Amicus Curiae*.

Aetna is directly affected by the varying decisions and legal analyses of the courts that have addressed the question of insurance coverage for asbestos-related disease claims. The great divergence in result and approach among the courts that have addressed this issue has embroiled Aetna in many disputes with its insureds concerning the application of its policies to asbestos-related claims. At this point, only this Court can provide the type of guidance that could restore some certainty to this area of nationwide concern. Accordingly, Aetna submits that this Court should grant the petition for a writ of certiorari and decide this case on the merits.

ARGUMENT

Introduction And Summary

This brief is submitted to address briefly the contention that this case is not appropriate for plenary review by this Court because it raises issues of state law. In its purest form, this contention consists of a false, though facially-appealing syllogism: Opponents of further review argue that because this Court's rulings on issues of state insurance law would not be binding on state courts, this Court should never address such issues.[1] Even though this reasoning begins from *Erie* principles that are

[1] *See, e.g.*, Eagle-Picher Br. Opp., at 7 ("[T]his Court's interpretation or application of state law will not prevent subsequent (and possibly different) resolution of this issue by state courts. . . . As

beyond question, it ignores the realities of asbestos coverage litigation and the benefits that would flow in practice from this Court's consideration. The confusion and proliferating litigation that the parties have described to the Court (and in which Aetna is enmeshed) are the results of conflicts among federal courts that serve no value associated with *Erie* or federalism. Though not technically binding, this Court's ruling on the issues presented for review would rationalize future decisions in the federal courts, offer a compelling precedent to state courts, and, perhaps most important, provide insureds and insurers with a basis on which to settle their disputes and thereby remove the present burden of coverage litigation from the judiciary. There is no realistic prospect that "controlling" decisions by state courts will perform the same functions, particularly in light of the fact that insureds are flocking to the District of Columbia to seek the most favorable result possible, not the most authoritative legal ruling. Finally, there can be no doubt that the issues raised by the First Circuit's decision have critical national importance.

1. The Nature Of The Conflicts Among The Federal Decisions

As the Court is aware from the petition in this case, liability insurance policies of the type involved in coverage litigation typically apply to injury or disease that results or occurs during the period that they are in force. Federal courts of appeals addressing this language have issued widely divergent rulings concerning its application to asbestos-related claims, which usually involve a substantial lapse of time between a claimant's first exposure

---

such, Supreme Court review of the issues presented in this case could never fulfill the essential function of its discretionary jurisdiction. . . .")

to asbestos and the appearance of the disease for which the claim has been filed. Relying on the "common, ordinary meaning" of the policy language in its decision below, the First Circuit held that the policy terms "injury" or "disease" do not include unknowable "tiny sub-clinical insults" to a claimant's lungs; the court thus concluded that "a disease 'results' under the policies when it becomes clinically evident, that is, when it becomes reasonably capable of medical diagnosis." 682 F.2d at 19, 25. By contrast, the D.C. Circuit described itself as unable to determine the same issue on the basis of the policy language, and relied on what it called the "reasonable expectations" of the insured. *Keene Corp.* v. *Insurance Company of North America*, 667 F.2d 1034, 1041-42 & n.12 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982). That court maintained that because an insured can reasonably expect a policy to "cover all future liability, except liability for injuries of which [it] could have been aware prior to its purchase of insurance," the term "injury" must be viewed to include "any part of the single injurious process that asbestos-related diseases entail." *Id.* at 1044, 1047. Finally, relying on a combination of "medical testimony," "policy considerations," and the interpretive principle of construing ambiguity in a policy against the insurer, the Sixth Circuit has held that the policy term "bodily injury" "should be construed to include the tissue damage which takes place upon initial inhalation of asbestos," precisely the type of damage that the First Circuit held was not within the common, ordinary understanding of the terms "injury" and "disease." *Insurance Company of North America* v. *Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *modified on rehearing*, 657 F.2d 814 (6th Cir.), *cert. denied*, 454 U.S. 1109 (1981). *Accord, Porter* v. *American Optical Corp.*, 641 F.2d 1128

(5th Cir. 1981), *cert. denied*, 454 U.S. 1109 (1981).[2]

As their holdings indicate, these decisions differ not only in result, but also in their fundamental approach. The First Circuit gave primary emphasis to the language of the policies, whereas the D.C. Circuit dismissed the same language with the criticism that "the insurance companies failed to develop policy language that would directly address the full complexity entailed by asbestos-related diseases." 667 F.2d at 1041. The decisions are in sharp conflict on the significance of medical evidence.[3] Indeed, they even disagree on the fundamental objective of a court asked to construe an insurance policy. In its decision below, the First Circuit took issue with the central premise of the *Keene* decision, which was that a court's "objective must be to give effect to the policies'

---

[2] In drug cases involving similar delays between initial exposure and later onset of a disease, two federal district courts have turned to these asbestos decisions as precedent, but have added two additional coverage theories to the list. The District Court for the Eastern District of New York ruled that disease allegedly arising from exposure to dienestrol (a drug closely related to DES) should be deemed to occur both when the disease "originates" and when it "is discovered by" the individual claimant. *Schering Corp.* v. *Home Insurance Co.*, 544 F. Supp. 613 (E.D.N.Y. 1982). The District Court for the District of New Jersey recently held that policies in force when medical evidence demonstrates that "damage to tissues" has occurred are triggered, without regard to when the drug was ingested or the disease appeared. *Sandoz, Inc.* v. *Employer's Liability Assurance Corp.*, No. 81-497 (D.N.J. Jan. 6, 1983).

[3] *See Keene Corp.* v. *INA*, *supra*, 667 F.2d at 1038 n.3 ("details" of asbestos-related disease not "relevant"); *Eagle-Picher Industries, Inc.* v. *Liberty Mutual Ins. Co.*, 682 F.2d at 23 (disagreeing with "analysis of the policy language and the medical evidence" in the *Forty-Eight* case).

dominant purpose of indemnity." 667 F.2d at 1041. Judge Coffin's opinion stressed, instead, the importance of implementing the actual "intentions of the parties" (682 F.2d at 23):

> [W]e believe the court's primary objective in these cases should be to ascertain the intentions of the parties. To state that a court must first "give effect to the policies' dominant purpose of indemnity" . . . is to weight too heavily a *presumed* intention to maximize coverage.

Principles requiring federal courts to defer to state courts on issues of state law do not explain these differences in result and approach—or suggest that this Court should allow those differences to persist. At the outset, the major decisions to date have been issued by federal courts. With the exception of the opinion of the *Eagle-Picher* court, these courts have purported to apply general principles of insurance law, without addressing in detail the rules of decision in force in particular states, differences among those rules, or choice-of-law principles. And even the *Eagle-Picher* court did not attribute its dispute with prior decisions to the fact that the rules of decision may have been derived from different states. Its dispute, the First Circuit noted, was with the manner in which the prior decisions had evaluated evidence common to all cases, and applied various legal principles used to interpret insurance policies. *See* 682 F.2d at 23.

The divergence among the decisions on the issue presented by this case does not, therefore, reflect differences among state rules of decision, the type of diversity that principles of federalism is designed to foster and that federal courts must respect. No principle of federalism should make this Court reluctant to mitigate the confusion and waste that has resulted from inconsistent federal decisions on the application of liability policies to asbestos claims.

2. The Practical Importance Of This Court's Review

Under *Erie*, this Court's decision on an issue of state law does not preclude the courts of that state from reaching a different result in a later case. However, it does not follow that a decision by this Court would be insignificant. To the contrary, as a practical matter, such a ruling would play a major role in removing uncertainty that, as others have noted, has spawned an ever-increasing mass of coverage litigation. Federal courts would be hard-pressed not to follow this Court's decision. State courts, though not bound by a ruling in this Court, would find it at least persuasive and, in all likelihood, would follow it in order to foster uniformity and certainty. Most important, a ruling by this Court would provide a basis whereby coverage disputes could be settled. The sharp differences among the decisions and the huge stakes involved now make settlements almost impossible.

Against these practical advantages, the concern that a decision by this Court would be undercut or displaced by controlling state-court decisions is unfounded. Indeed, if recent experience is a guide, the conflict among federal decisions has made it more likely that litigation will gravitate to the federal courts in the District of Columbia, not to state court systems that could issue authoritative rulings. Following the decision of the Court of Appeals for the District of Columbia Circuit in *Keene*, as Aetna predicted in its petition for a writ of certiorari in that case, the District Court for the District of Columbia has been deluged by lawsuits filed by drug and manufacturing companies seeking the broad scope of insurance coverage provided by that decision. Aetna alone has been named in six such lawsuits. *Owens-Illinois, Inc.* v. *Aetna Casualty and Surety Co.*, No. 82-0089 (D.D.C.) (asbestos); *Eli Lilly & Co.* v. *The Home Insurance Co., et al.*, No. 82-0669 (D.D.C.) (DES); *Hercules, Inc.* v. *Aetna Casual-*

ty and Surety Co., No. 82-0854 (D.D.C.) (Agent Orange); *Upjohn Co.* v. *General Accident Insurance Co.*, No. 82-1019 (D.D.C.) (DES); *Johnson & Johnson* v. *Aetna Casualty and Surety Co.*, No. 82-1219 (D.D.C.) (DES); *Abbott Laboratories* v. *Aetna Casualty and Surety Co.*, No. 82-0940 (D.D.C.) (DES).[4] Other such suits to which Aetna has not been a party include *Brinco Mining Ltd.* v. *Federal Insurance Co.*, No. 82-1165 (D.D.C.) (asbestos); *National Gypsum Co.* v. *American Motorists Ins. Co.*, No. 82-1332 (D.D.C.) (same); *E. R. Squibb & Sons* v. *American Motorists Ins. Co.*, No. 82-0740 (D.D.C.) (DES). Notably, in each one of these cases, there was literally *no* connection with the District of Columbia and *no* reason for the dispute to be litigated there, other than the fact that the insured believes that the *Keene* decision automatically, and without factual review, provides more comprehensive coverage than other courts would provide.[5]

The conduct of respondent Eagle-Picher is illustrative. In its brief in opposition, Eagle-Picher advised this Court to "defer" review "to allow the coverage issue to be developed further in the lower courts." Eagle-Picher Br.

---

[4] Aetna has been sued in two additional actions in the local District of Columbia Superior Court where diversity jurisdiction was lacking. *Keene Corp.* v. *Insurance Company of North America*, No. 3152-82 (Superior Court of D.C.) (asbestos personal injury); *Keene Corp.* v. *Hartford Accident & Indemnity Co.*, No. 13471-82 (Superior Court of D.C.) (asbestos property damage).

[5] As a result, these actions have spawned extensive litigation over which forum should decide coverage disputes, including motions for transfer pursuant to 28 U.S.C. § 1404, and disputes over which of two parallel actions should be given priority. Some motions to transfer suits from D.C. or to obtain priority in other forums have been granted and others have been denied.

Opp., at 13. However, following the First Circuit's decision below, it filed an action in the United States District Court for the District of Columbia against some of its excess insurers. *Eagle-Picher Industries, Inc.* v. *American Ins. Co.*, No. 82-1841 (D.D.C. filed June 30, 1982). More decisions by federal district courts chosen by insureds with a view to maximizing coverage will not mitigate the confusion and waste that now urge heavily in favor of further review.

In short, review should not be withheld on the hope that further litigation in lower courts will result in development toward greater certainty in this area of the law or toward decisions by authoritative state courts. The coverage issues raised by asbestos have been fully aired for over five years. The conflicts among both the results and approaches taken by the courts are increasing. Rampant forum-shopping stands in the way of rationalization of governing principles in lower federal courts and state courts. This Court has an opportunity to end the judicial burden caused by that forum-shopping, and to provide guidance for the courts and the parties. Finally, as others have demonstrated in detail, the importance of the issue, the monetary stakes involved, the potential benefits to courts now struggling with coverage litigation, and the prospect that resolution of insurance issues may remove obstacles to more efficient processing of underlying asbestos litigation all urge that this Court review this matter quickly and fully.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

HERBERT J. MILLER, JR.
JAMES E. ROCAP, III
(Counsel of Record)
STEPHEN L. NIGHTINGALE
Miller, Cassidy, Larroca & Lewin
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400
Attorneys for *Amicus Curiae*
Aetna Casualty and Surety Company